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Issue Date: 12 December 2006

CASE NO.: 2004-LHC-01632

OWCP NO.: 01-147691

In the Matter of

W.C.[1]
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insured

DECISION AND ORDER ON REMAND AWARDING ATTORNEY'S FEES

I. Introduction

This proceeding arises from a claim for worker's compensation benefits under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (the "Act"), and the case is currently before the Office of Administrative Law Judges ("OALJ") on remand from the Benefits Review Board ("BRB") for consideration of the Claimant's entitlement to an award of attorney's fees under section 28 of the Act. *See Collins v. Electric Boat Corp.*, BRB No. 05-0736 (May 23, 2006) (unpublished).

The Claimant, who has worked for the Employer since 1980 as a shipyard test technician, has undergone several surgical procedures for injuries suffered to his right hand and wrist during the course of his employment. After his third operation, the Claimant sought disability compensation for an 18 percent permanent impairment to his right hand. The Employer voluntarily paid permanent partial disability compensation for this injury based upon the 18 percent impairment rating but took a credit in

[1] In accordance with Claimant Name Policy, which became effective on August 1, 2006, the Office of Administrative Law Judges uses a Claimant's initials in published decisions in lieu of the Claimant's full name. *See* Mem. From C.J. John M. Vittone, ALJ, Claimant Name Policy (July 3, 2006) *available at* http://www.oalj.dol.gov/PUBLIC/RULES_OF_PRACTICE/REFERENCES/MISCELLANEOUS/CLAIMANT_NAME_POLICY_PUBLIC_ANNOUNCEMENT.PDF.

the amount of prior payments made under the Act and the Rhode Island workers' compensation statute following the Claimant's previous two surgeries. The parties' unresolved dispute over the amount of permanent partial disability compensation due to the Claimant for the permanent impairment of his right hand and the amount of any credit available to the Employer was referred to OALJ for a formal hearing in accordance with section 19(d) of the Act.

At the hearing, the Claimant contended that he was entitled to benefits for the full 18 percent impairment to the hand as assigned by Dr. Ashmead. The Claimant also contended that the Employer's credit was limited to the $5,400 previously paid under the state act for disfigurement. The Employer contended that Dr. Ashmead improperly applied the "combined values" table of the AMA Guides to the Evaluation of Permanent Impairment, and it argued that the Claimant was limited to an award for the totality of his combined hand/wrist impairment which was assessed by Dr. Weiss as a 19 percent impairment of the right upper extremity. At a post-hearing deposition, Dr. Weiss explained how he arrived at a 19 percent impairment of the upper extremity, and the Employer conceded the Claimant's entitlement to compensation for a 19 percent arm impairment subject to credit for all prior payments which totaled over $20,000.

In a Decision and Order Awarding Benefits issued on April 8, 2005, I awarded the claimant permanent partial disability benefits in the amount of $7,038.26, which represented an award of $27,163.28 for a 19 percent work-related loss of the use of his right arm pursuant to section 8(c)(1) and (19) of the Act, less a credit to the Employer in the amount of $20,125.02 pursuant to sections 3(e) and 14(j) of the Act and the "credit doctrine." Decision and Order at 7.

The Claimant's attorney filed a fee petition seeking attorney's fees and expenses totaling $14,144.70, based on 51.92 hours of attorney time at $250.00 per hour and 6.25 hours of paralegal services at $70.00 per hour, plus expenses of $727.20. The Employer objected that the fees should be reduced commensurate with the compensation awarded. In a Supplemental Decision and Order issued on May 11, 2005, I awarded the Claimant's attorney $7,071.94 in fees and costs, approximately one half of the amount sought. In evaluating the reasonableness of the requested fees in light of the decisions in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *General Dynamics Corp. v. Horrigan*, 848 F.2d 321 (1st Cir. 1988), I found that the compensation and credit issues were intertwined and, thus, that

there were no unsuccessful, unrelated claims for which a fee could be denied *in toto*. Supp. Decision and Order at 2. I then addressed whether the requested fees were reasonable in relation to the results obtained and concluded that they were not. In this regard, I noted that "[a]lthough the Claimant did obtain [an] additional $7,038.26 in compensation payments by litigating his claim, this amount was conceded by the Employer at the outset of the hearing, and the Claimant's position was rejected." *Id.* Consequently, I found that an attorney's fee of $7,071.94, half of that requested, was reasonably commensurate with the necessary work done, taking into account the regulatory criteria of 20 C.F.R. §702.132(a). *Id.* at 2-3.

On appeal, the BRB held that I properly considered the amount of benefits obtained in determining the reasonableness of the attorney's fees. BRB Decision and Order at 3. However, it further held that it could not affirm the fee award as the reduction in the requested fees was based on an erroneous finding that the Employer had conceded the Claimant entitlement to additional compensation in the amount of $7,038.26 at the *outset of the hearing*. *Id.* That is, the BRB agreed with the Claimant that the Employer did not concede entitlement to additional benefits until after the formal hearing. *Id.* Accordingly, the BRB remanded the case for reconsideration of the amount of the attorney's fee to which the Claimant's attorney is entitled, stating that "the fee should be for an amount that is reasonable in relation to the results obtained" and that "it is within the administrative law judge's discretion on remand to determine a reasonable fee for work in this case based on the record and the applicable law." *Id.* at 3-4.

II. Discussion

As the BRB observed in remanding this case, the United States Court of Appeals for the First Circuit has stated that the "lodestar method" (the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate) is the preferred starting point for assessing a fee request pursuant to *Hensley*. *Coutin v. Young & Rubicam Puerto Rico, Inc.*, 124 F.3d 331, 337 (1st Cir. 1997) (*Coutin*).[2] While the Court in *Coutin* described the lodestar method as a "tool" or "device" and not a "straightjacket," recognizing that some deviation may be

[2] Decisions of the United States Court of Appeals for the First Circuit constitute controlling precedent since the injury in this case occurred in Rhode Island within the First Circuit's jurisdiction. 33 U.S.C. § 921(c); *Dantes v. Western Foundation Corp. Ass'n.*, 614 F.2d 299, 300-01 (1st Cir. 1980).

permissible in "highly unusual" situations, it cautioned that "a court shuns this tried-and-true approach at its peril." *Id.* at 337. At the same time, the Court went on to emphasize that the fee-awarding court has broad discretion in fashioning the appropriate lodestar in a case as it may segregate time spent on unsuccessful claims, eliminate excessive or unproductive hours and assign more realistic rates to the time spent. *Id.* Thus, "the trial court retains the authority to adjust the lodestar after initially computing it – but it must do so in accordance with accepted principles." *Id.* (noting that both the Supreme Court in *Hensley* and the First Circuit have approved the factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) as appropriate considerations in fixing a lodestar).[3] This discretion is abused "when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." *Coutin* at 336, quoting *Foster v. Mydas Assocs.*, Inc., 943 F.2d 139, 143 (1st Cir. 1991).

I begin the reconsideration of the fee application with a clarification of the procedural history of the case which will eliminate potential for any confusion on review. As discussed, the Claimant sought compensation for an 18 percent permanent impairment of his right hand based on the rating assigned by Dr. Ashmead. There was no dispute that this claim would entitle the Claimant to compensation for 43.92 weeks at the rate of $458.22 per week for a total of $20,125.02. 33 U.S.C. §§ 908(c)(3) and (19). The Employer accepted this claim and voluntarily paid the Claimant $1,784.53 on April 13, 2004 after deducting a credit in the amount of $18,340.49 based on its prior compensation payments. Employer's Exhibit 16. Thus, the credit taken by the

[3] The 12 *Johnson* factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorney(s) due to acceptance of the case; (5) the customary fee; (6) the nature of the fee (fixed or contingent); (7) the time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney(s); (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) the size of awards in similar cases. *Johnson*, 488 F.2d at 717-719. The Court in *Coutin* explained that there are three measures of success or "results" that must be evaluated: (1) the plaintiff's success claim by claim; (2) the relief actually achieved; and (3) the societal importance of the rights vindicated; or all of these measures in combination. 134 F.3d at 338.

Employer accounted for the difference between the full amount of compensation claimed and the amount actually awarded.

The Claimant disputed the amount of the credit, essentially asserting that the Employer had misapplied the credit doctrine and thereby deprived him of the full amount of compensation to which he was entitled based on Dr. Ashmead's impairment rating. *See* Administrative Law Judge Exhibits 1 (LS-18 filed by the Claimant on April 22, 2004) and 6 (Pre-trial Statement filed by the Claimant on August 30, 2004). As Attorney Roberts made clear at the hearing and in his post-hearing brief, it was the Claimant's position that the Employer should only be allowed to deduct credit in the amount of a prior $5,400.00 disfigurement or "scar" payment and the $1,784.53 voluntary payment made on April 13, 2004 from the $20,125.02 total compensation due for the 18 percent hand impairment. Hearing Transcript at 11-12; Claimant's Post-Hearing Brief at 3-4.

After the Claimant objected to the amount of the credit applied by the Employer in calculating the voluntary compensation payment and requested a formal hearing, the Employer sent him to Dr. Weiss in July of 2004. Employer Exhibit 18. Based on his evaluation, Dr. Weiss concluded that the Claimant had a 19 percent permanent impairment of the arm. Employer Exhibit 19; Joint Exhibit 2. In my earlier decision on the merits of the claim, I credited Dr. Weiss over Dr. Ashmead and found that the Claimant was entitled to be compensated for a 19 percent permanent impairment of the arm instead of the 18 percent permanent impairment of the hand assessed by Dr. Ashmead. Decision and Order at 6. The practical effect of my finding on the nature and extent of the Claimant's impairment was to increase the amount of compensation owed which is what the Employer conceded in its post-hearing brief. That is, the 19 percent arm impairment resulted in an entitlement to 59.28 weeks of compensation under sections 8(c)(1) and (19) of the Act (312 weeks x .19 = 59.28), while an 18 percent hand impairment under section 8(c)(3) and (19) would yield only 43.92 weeks of compensation (244 x .18 = 43.92). The 59.28 weeks of compensation multiplied by the stipulated compensation rate of $458.22 per week produced a total compensation entitlement of $27,163.28, less the credits for prior payments of $20,125.02, for a net award of $7,038.26. Decision and Order at 7.[4] In other

[4] The $20,125.02 credit allowed to the Employer was based on the prior payments of $18,340.49 plus the $1,784.53 voluntary payment made on April 13, 2004.

words, the Claimant only achieved additional relief because the Employer, attempting to develop evidence in response to the claim, obtained the opinion from Dr. Weiss that the permanent impairment is properly assessed as a 19 percent loss of use of the arm. With this clarification of the case's history out of the way, I will now turn to reconsideration of the attorney's fees with due consideration to the applicable *Johnson* factors.[5]

First, Attorney Roberts has billed for 51.92 hours of attorney time and 6.25 hours of paralegal time to prosecute the case before the OALJ. Second, the case presented medical and legal issues which were not unusually difficult or novel and which could have been handled by any attorney with a solid background in prosecuting claims under the Act. Third, there is no indication that Attorney Roberts, who has substantial experience in representing claimants under the Act and is generally regarded as one of the more effective advocates in the local area, was precluded from taking on other cases by accepting the Claimant's case. Fourth, the total fees requested, which are contingent on the Claimant's success, are well within the range of fees approved in cases of similar complexity. Finally, with respect to the amount involved and the results obtained, the Claimant did not prevail on his credit arguments, and the additional $7,038.26 in compensation resulted not so much from the efforts of counsel but from the evidence introduced by the Employer. In my view, this is clearly the type of case where the Claimant has prevailed only on an "insubstantial subset of [his] interrelated claims and obtain[ed] only limited relief" so that "the trial court has discretion to shrink fees to reflect that inferior result." *Coutin*, 124 F.3d at 339. I recognize that an argument exists on these facts of this case that no more than a minimal fee is warranted, but I am persuaded that such a drastic reduction would be unfair and unwarranted, especially given the fact that the Employer has only requested a two-thirds reduction. Certainly, Attorney Roberts deserves some credit for his dogged pursuit of additional relief, and I am mindful of the concern an overly parsimonious approach to fee setting, focused narrowly on the dollar amount of relief obtained, has the undesirable result of discouraging competent counsel from taking on difficult or novel cases. *See City of Riverside v. Rivera*, 477 U.S. 561, 579 (1986) (plurality opinion involving attorney's fees under 42

[5] The record contains insufficient information to some of the *Johnson* factors such as whether there were any time limitations imposed by the client or the circumstances; the "undesirability" of the case; and the nature and length of Attorney Roberts' professional relationship with the Claimant.

U.S.C. § 1988). *See also Kinnes v. General Dynamics Corporation*, 25 BRBS 311, 316 (1992).

Having taken all of this into consideration, I remain of the view that a 50 percent reduction in the requested fees produces the appropriate adjusted lodestar and is reasonable based on the quality of the representation, the complexity of the legal issues involved, and the amount of the benefits obtained. Therefore, I conclude that attorney's fees and expenses in the amount of $7,071.94 is reasonably commensurate with the necessary work done. 20 C.F.R. § 702.132(a).

III. Order

The Employer shall pay directly to the Claimant's attorney, Scott N. Roberts, attorney's fees and costs in the amount of $7,071.94.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts
DFS:bjk